IN THE

Supreme Court of the United States

October Term 1943

No. 183

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

A

Summary Statement of the Matter Involved.

By an indictment filed in the United States District Court for the Eastern District of New York on March 23, 1943, the petitioners were charged with the possession and transportation of distilled spirits in containers which did not bear stamps denoting payment of Internal Revenue taxes (26 U. S. C., Sec. 2803(a)). The statute does not forbid such possession or transportation of spirits not intended for sale or manufacture of an article intended for sale (Sec. 2803(a)(6)).

It was proved at the trial that on December 26, 1942, agents of the Alcohol Tax Unit found in the back seat of an automobile occupied by the petitioners, a five-gallon can,

containing about three and one-half or four gallons of alcohol (R. 24). The can was in a paper carton; both can and carton had been previously used, and were dirty (R. 16, 17, 24). The alcohol contained particles of rust (R. 29).

In explanation of their possession, the petitioners offered proof that they had obtained the alcohol an hour or so before the seizure, to be used as an anti-freeze in trucks which they operated. It was obtained from a man named Feoto, who testified to the circumstances.

Feoto said that he had found the can in cleaning the basement of an unoccupied garage where he was temporarily employed. It contained radiator alcohol, as he thought, and he offered it as radiator alcohol to the plaintiffs (R. 33, 34). They paid him $2.50 for it, approximately eighty cents a gallon (R. 41).

The transaction was a casual one, and the petitioners testified that they had not opened the can nor examined its contents between the time when Feoto first produced it and placed it on the back seat of the automobile, and the time when it was opened by the Government agents, about an hour later (R. 40, 42).

The respondent offered no proof in rebuttal. There was no contradiction of Feoto's testimony, nor that of the petitioners. Feoto is a brother-in-law of the petitioner Vigorito; except for this relationship he was a disinterested witness. He has never been indicted for his own admitted possession and sale of the alcohol. There was not even a suggestion in the evidence that the petitioners were or ever had been engaged in the traffic of liquor, licit or illicit.

The theory upon which the case was submitted to the jury was that there was an issue of veracity, because of a discrepancy between this testimony and the explanation made by Vigorito at the time of the seizure.* This earlier

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* The only discrepancy was that in the sidewalk statement, Vigorito had said that the alcohol came from a barrel "in a small room off of the office of the garage" (R. 13). Otherwise, the statement was completely consistent with the testimony.

explanation had been proved only for the purpose of contradicting it in one of its details. Neither the prior statement, nor the testimony given in contradiction, was disputed by the petitioners.

Nevertheless, its inconsistency in this one detail was urged upon the jury as presenting an issue of veracity between the petitioners and the Government agents. The petitioners sought correction of this improper argument, pointing out that there was no such issue. They contended that the attack upon their testimony because (in agreement with the prosecution witnesses) it contradicted the unsworn statement, was really a pretext for an improper exploitation of previous convictions for other offenses. The Trial Court refused to correct it, and the Circuit Court of Appeals has held it to be within the limits of proper argument.

On appeal to the Circuit Court of Appeals for the Second Circuit, petitioners asserted that the judgment should be reversed on the ground that their proof had destroyed the presumption that their possession was guilty, and that in the final state of the evidence there was nothing to bring them within the statute; and upon the ground that argument of the prosecutor, above referred to, the failure of the Trial Court to correct it, and certain elements of the Trial Court's charge, violated the requirements of due process.

The Circuit Court of Appeals rendered its decision and filed its opinion herein on March 27, 1944. In affirming the judgment of conviction, it stated that the Trial Court's submission of the case to the jury was justified by the fact that it was a matter of affirmative defense for the petitioners to prove that their actions were within the statutory exception, and by the fact that the credibility of interested witnesses is always a question of fact for the jury. The prosecutor's argument that there was an issue of veracity, although the record shows no contradiction of any witness by any other witness, was characterized as being well

within the scope of permissible comment, and misstatement of the testimony in the Trial Court's charge was dismissed with the comment that proper objection had not been taken.

Petitioners herein filed a petition in the said Circuit Court of Appeals in due course, on April 11, 1944, praying for a rehearing. Thereafter, on May 23, 1944, the decision of the Circuit Court of Appeals was handed down, denying the petition for rehearing.

B

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 347 (a); Section 240 (a) of the Criminal Code, as amended by the Act of February 13, 1925; and Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

C

The Questions Presented Are:

1. Whether in the absence of any proof that the defendants had the alcohol in their possession for sale, and in the face of uncontradicted and unimpeached evidence to the contrary, the submission of the question to the jury was proper.

This involves a fundamental question as to the burden of proof in a criminal case, where the crime is defined in general terms, subject to exceptions separately stated. In such cases it is said that the exceptions are matters of affirmative defense; which necessarily implies that there is a rebuttable presumption that the exceptions do not apply. The question then is whether these cases follow the usual rule: that the production of evidence sufficient to challenge the presumption eliminates it from the case as an element

of proof, and casts upon the opposing side the burden of proving as a fact what was at first presumed.

It involves also a question of importance relating to the trial functions of judge and jury. The Circuit Court of Appeals upheld the submission of this issue to the jury, although the evidence to the contrary was uncontradicted and unimpeached. That putative issue was wholly inconsistent with all the facts in evidence. It was upheld upon the ground that the credibility of interested witnesses is always a question of fact for the jury. This Court has held to the contrary in civil suits, *Penn. RR. Co.* v. *Chamberlain,* 288 U. S. 333; *C. & O. Ry. Co.* v. *Martin,* 283 U. S. 209. Your petitioners believe that the present case squarely presents the question whether the rule is different in a criminal case; whether less proof is required to establish guilt beyond a reasonable doubt than to constitute a preponderance of evidence; whether speculation is a sufficient basis for conviction of a felony.

The mention of interested witnesses does not refer to the defendants, but to the witness Feoto, from whom the alcohol was obtained. He was a brother-in-law of one defendant. His testimony was contrary to interest to the extent that, if true, it subjects him to possible prosecution for prior possession of the same alcohol.

2. Whether the Circuit Court of Appeals for the Second Circuit is in error in its rejection of the doctrine that where proof of guilt depends upon circumstances, and where all of the substantial evidence is as consistent with innocence as with guilt, it is the duty of the reviewing court to reverse a conviction.

3. Whether the argument of the prosecutor, the failure of the Trial Court to correct it, and the Trial Court's misstatement of the evidence, deprived the defendants of a fair trial.

D

Reasons Relied Upon for the Allowance of the Writ.

The decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Ezzard* v. *United States*, 7 F. (2) 808.

In the *Ezzard* case, a conviction for failure to register and pay a special tax as a dealer in narcotic drugs was reversed by a divided court. Under the statute there involved, possession of such drugs was presumptive evidence of a violation.

The prevailing opinion held that the statutory presumption merely dispensed with initial proof of the fact presumed. Evidence was produced to rebut the presumption. The evidence not being incredible on its face, and not being contradicted or met with any actual proof of the presumed fact, could not arbitrarily be ignored, and there was no issue to submit to the jury. The burden of proof never shifts from the prosecution.

The dissenting judge in the *Ezzard* case took the same position taken by the Court below, in the present case. It is said that the evidence of innocent possession came from an interested witness, and that the credibility of such testimony is always a question of fact for the jury. That this was intended literally is clear from the citation of *Wheeler* v. *United States*, 80 F. (2d) 678, decided in the Fifth Circuit.

But the Circuit Court of Appeals in the present case has gone further than either the *Wheeler* opinion or the dissenting opinion in the *Ezzard* case. It has applied the stated principle to the testimony, not of a defendant, but of a witness whose interest is apparently divided, and certainly remote. It seems impossible to reconcile this view with those expressed by the majority in the *Ezzard* case, and necessarily given effect in the decision of that case.

The decision below seems also to be in conflict with decisions of this Court which were relied upon in *Ezzard* v. *United States*. In *Penn R. R. Co.* v. *Chamberlain*, 288 U. S. 333, it was said in substance that an essential fact cannot be found upon the basis of presumption or inference, in the face of unimpeached and uncontroverted evidence to the contrary. In *C. & O. Ry.* v. *Martin*, 283 U. S. 209, the same principle was applied to a case in which the uncontradicted evidence was that of an interested witness. The proposition that such evidence must under all circumstances be submitted to the jury was explicitly rejected.

If the credibility of evidence rebutting a statutory presumption is always a question of fact, to be determined in favor of the defendant before the prosecution may be required to produce evidence supporting the presumption, then there is an absolute burden of proof upon the defendant. He may be convicted "even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense". *Tot* v. *United States*, 319 U. S. 463, 473 (concurring opinion). Such a construction of the statute suggests grave constitutional doubts with respect to the validity of the statute. *Linder* v. *United States*, 268 U. S. 5, 18. The question presented is one which has not been, but should be, decided by this Court.

In the exercise by this Court of its "judicial supervision of the administration of criminal justice in the Federal Courts" it should establish and maintain a "civilized standard" of evidence (*McNabb* v. *United States*, 318 U. S. 332). It is utterly repugnant to such a standard that the automatic discredit naturally applied by a jury to a defendant with a bad record (albeit for crimes wholly different from that charged in the instant case) should alone and unsupported be deemed sufficient to uphold a conviction. Consider the impossible predicament in which the decision below places a defendant: Unless he takes the stand, his guilt is presumed. If he does testify, his previous convictions are said to be enough to warrant disbelief by a jury

of the explanation which he alone, ordinarily, can offer. Thus the past alone is said to be enough to condemn, absent any proof of guilt or any evidence in contravention of the explanation of mere possession; not even shown to have been a knowing possession.

WHEREFORE petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed, and that petitioners may have such other relief as this Court may deem appropriate.

Dated: New York, N. Y., June 21, 1944.

CONRAD MARINO,
GABRIEL VIGORITO,
Petitioners,

By J. BERTRAM WEGMAN,
Counsel for Petitioners.

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THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Court below rendered an opinion, a certified copy of which is annexed to the record submitted herewith. The opinion is not as yet officially reported.

Jurisdiction

The decision affirming the conviction was handed down on March 27, 1944.

The decision denying the petition for rehearing was handed down on May 23, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Criminal Code, as amended by the Act of February 13, 1925, Section 347(a), Title 28, U. S. C. See also Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

Statement

The petitioners were convicted of the possession and transportation of distilled spirits in an unstamped container, under a statute which declares that its provisions shall not apply to spirits not intended for sale or for use in the manufacture or production of any article intended for sale.

The bare possession and transportation of alcohol were proved. There was no proof of any intention to sell it or to use it in the production of any article for sale. There was not even proof of knowledge on the part of petitioners that the alcohol was potable. There were no circumstances beyond the fact of possession from which such intent could be inferred. The small quantity of alcohol, the fact that the can and carton in which it was carried were used and dirty, that the can was only partly full, and that the alcohol contained rust particles, all pointed in the opposite direction.

Moreover, the petitioners immediately stated to the Government agents that it was radiator alcohol, to be used in a truck as an anti-freeze, and informed the agents when and where they had obtained it. They were actually truck operators, as the agents verified. There was not the least suggestion that they ever had dealt in alcohol.

At the trial, the petitioners produced the man from whom they got the alcohol. His testimony that he had found it in cleaning a garage basement, believed it to be radiator alcohol, and sold it to the defendants to be used as an anti-freeze, was consistent and contained nothing inherently incredible. The garage where he said he had found the alcohol was the one to which the petitioners had taken the Government agents, and the latter had investigated it.

Despite the investigation, and despite the fact that the agents testified that they had followed the petitioners' automobile prior to the seizure, they did not contradict the defense testimony in any particular.

The prosecution made no proof whatever in rebuttal. In the entire record, therefore, there was no actual proof that the petitioners' possession was for the purpose of sale or the production of any article for sale, nor of circumstances inconsistent with a permitted possession. There was not even any proof that the defendants knew that the alcohol was potable.

Statute Involved

Section 2803 (a), Title 26, U. S. C.:

"(a) Requirement—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits. The provisions of this section shall not apply to——

* * * * * *

(6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; * * *."

Specification of Errors Assigned

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the witness Feoto was an interested witness.

2. In holding as a matter of law that the credibility of an interested witness is in all circumstances a question of fact for the jury.

3. In holding that the testimony of the witness Feoto was not sufficient to rebut the presumption of a purpose to sell, and put the prosecution to actual proof of such purpose.

4. In holding as a matter of law that the petitioners had the burden of proof, as distinguished from a burden of coming forward with proof, of their affirmative defense.

5. In holding that the issue of the petitioners' guilt was properly submitted to the jury, when as a matter of law all of the facts and circumstances proved were consistent with a reasonable theory of innocence, and there was no substantial circumstance consistent only with the theory of their guilt.

6. In its refusal to correct error by the Trial Court in the conduct of the trial, amounting to a denial of due process.

7. In affirming the judgment of conviction in the District Court.

POINT I

The Circuit Court of Appeals erred in holding that the issue of petitioners' guilt was properly submitted to the jury.

This petition, and the record below, present the question whether a conviction can be sustained in the absence of any evidence whatever of a fact which is an essential element of the crime charged, and in the face of evidence to the contrary.

The exceptions of which subdivision (6) of Section 2803 (a), Title 26, U. S. C. is one, have been held to be matters of affirmative defense. This is because they are not an integral part of the sentence defining the offense. *Scher* v. *U. S.*, 305 U. S. 251.

Nevertheless, the statute does provide in plain terms that its provisions shall not apply to spirits not intended for sale or for use in the manufacture or production of any article intended for sale.

The Circuit Court of Appeals has said that the burden was upon the petitioners to prove that their possession was not for the purpose of sale. This appears to be contrary to all accepted standards of proof in criminal cases. The burden of proof never shifts from the prosecution. *Coffin* v. *U. S.*, 156 U. S. 432, 461; *McAdams* v. *U. S.*, 74 F. (2d) 37, 40 (Eighth Circuit); *Ezzard* v. *U. S.*, 7 F. (2d) 808, 811 (Eighth Circuit).

The effect of the statute in question here is the same as though it forbade the possession or transportation in unstamped containers of spirits intended for sale, and then declared that possession of the spirits should be presumptive evidence that they were for the purpose of sale.

It is settled that such a presumption is only a rule of evidence, imposing upon the defendant the burden of producing evidence, and dispensing with proof of the fact presumed until it has been put in issue by some evidence to the contrary. *Tot* v. *U. S.*, 319 U. S. 463; *Morrison* v. *California*, 291 U. S. 82, 90, 91; *Casey* v. *U. S.*, 276 U. S. 413, 418; *Luria* v. *U. S.*, 231 U. S. 9, 25; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286. Upon the production of such proof, the presumption disappears, *N. Y. Life Ins. Co.* v. *Ross*, 92 U. S. 281, 284, 285; *Wiget* v. *Becker*, 84 F. (2d) 706, 708 (Eighth Circuit); *Von Crome* v. *Travelers' Ins. Co.*, 11 F. (2d) 350, 352 (Eighth Circuit); *Ezzard* v. *U. S.*, 7 F. (2d) 808, 811 (Eighth Circuit).

In the present case, the testimony of the witness Feoto required the presumption to be discarded, and put the prosecution to actual proof.

The facts proved by his testimony are inconsistent with guilt under the statute, as the Trial Judge perceived. But the Trial Judge erroneously treated the presumption as persisting, and submitted to the jury an issue upon which all of the proof was on one side. There was no evidence in the case from which the jury might infer such a purpose; and the submission to the jury was therefore error.

The Circuit Court of Appeals, however, held that even if the burden of proof was upon the prosecution, the sub-

mission was correct because the credibility of interested witnesses is always a question of fact for the jury. There can be no quarrel with this as a general rule; but it is not a universal one. *C. & O. Ry. Co.* v. *Martin*, 283 U. S. 209, 216-220; *Kalos* v. *U. S.*, 9 F. (2d) 268 (Eighth Circuit).

In the cases cited in the opinion below, it was applied to the testimony of defendants in their own behalf. Here the Circuit Court of Appeals has gone further. The only basis for describing Feoto as an interested witness was the fact that he is related by marriage to one of the petitioners. His testimony, putting himself in possession of the alcohol, subjected him to the same charge as that made against the petitioners. It was thus strongly against his interest.

The decision of the Circuit Court of Appeals in the present case is in direct conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Ezzard* v. *U. S.*, supra, 7 F. (2d) 808. The petitioners urge that the court below is in error, and that a writ of certiorari should be granted so that the applicable principles may be stated by this Court, and the error corrected.

POINT II

The charge of the Trial Court, and the argument of the prosecutor to which the Court gave its sanction, deprived the petitioners of a fair trial. The Circuit Court of Appeals, in the proper application of principles announced by this Court, should have reversed the convictions upon that ground.

In the trial of this case, not one fact testified to by any Government witness was contradicted by any defense witness. Not one fact testified to by any defense witness was contradicted by any Government witness.

Nevertheless, the prosecutor persistently argued (R. 46, 47, 48) that there was an issue of veracity between the Government witnesses, who were agents of the Alcohol Tax

Unit, and the defendants. There was no basis in fact for the argument.

Counsel for the defendants made prompt objection, but the Trial Judge refused to correct the misstatement. With this implied sanction, the prosecutor continued his summation, and repeated the argument, upon assumed facts not in the record. Counsel again objected, and was again overruled by the Court. The Court refused to permit the stenographer to record the summation of the prosecutor.

The Circuit Court of Appeals, in its opinion, said that the argument of the prosecutor was justified on the evidence and was well within the scope of permissible comment. It is respectfully urged that the Court was in error.

> "Civilized standards of procedure and evidence * * * are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."
>
> *McNabb* v. *United States*, 318 U. S. 332, 340.

Civilized standards require that prosecutors be scrupulous to avoid appeals to prejudice, and that trial courts be vigilant to correct such appeals, if made. When, with the sanction of the Court, a prosecutor is permitted to argue that an acquittal will brand government agents as liars, and that the issue for the jury is whether they believe the federal agents or the defendants, there cannot be doubt that the jury will return a verdict of guilty, even though, as here, there was not the slightest issue of relative integrity.

The Trial Judge, in his instructions, used the same language which has been objected to so vigorously when it was used by the prosecutor. He stated that there was a question of relative veracity; when exception was taken to the repetition of the phrase, the Court replied that there was a question of veracity between the statement made by the defendants at the time of arrest, and the testimony of the defendants' witness produced at the trial.

Apparently what he meant was that Feoto's testimony was suspect because it contradicted the unsworn statement of Vigorito in one detail, as to which the statement had also been contradicted by the Government agents.

But the Court's use of the prosecutor's language, in discussing the very statement which the prosecutor had said presented an issue of veracity between the defendants and the agents, inevitably left the impression with the jury that the Court had adopted and approved the prosecutor's argument.

The opinion of the Circuit Court of Appeals discussed at some length two clear misstatements of the evidence which occurred in the Trial Court's charge. One of these in particular was made the basis for a suggestion to the jury that the actions of the defendants were not those of innocent people. The Judges below differed on the question whether this "gave the incident a significantly different character from that which the testimony presented."

It was said, however, that these misstatements furnished no ground for reversal, for want of proper objection; and that it is doubtful whether the jury was misled.

This comment overlooks the real and substantial prejudice which resulted from the cumulative misrepresentation of the issue which the jury was to decide. The misstatements followed the improper argument of the prosecutor, and the Court's apparent approval of it, in the face of vigorous objection and exceptions to the Court's rulings. These objections surely directed the Court's attention to the error said now to be venial because not by itself made the subject of specific exception. They emphasized further the wholly false issue of character and veracity, and insured conviction of the defendants without proof, upon the wholly irrelevant basis of their prior convictions for other offenses.

The whole charge was an argument for conviction, and that is apparent even from a reading of its text. This Court should not overlook the added force of inflection and tonal emphasis.

CONCLUSION

The writ of certiorari should be granted so that this Court may say whether in a case such as this a conviction may be sustained in the absence of any proof of guilt, in the face of direct proof of innocence; whether a jury may discredit uncontradicted and unimpeached evidence of innocence merely because defendants have previously been convicted and have been compelled to disclose that record in order to meet the burden of adducing evidence to rebut a presumption.

This conviction needs review here unless the doctrine of proof of guilt beyond the reasonable doubt is to become an empty phrase in any case where the prosecution is aided by a statutory presumption of unlawful purpose.

Respectfully submitted,

J. Bertram Wegman,
Counsel for Petitioners.

Emanuel H. Reichart,
of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 183

CONRAD MARINO AND GABRIEL VIGORITO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 82–86) is reported at 141 F. (2d) 771.

JURISDICTION

The judgment of the circuit court of appeals was entered May 23, 1944 (R. 88). The petition for a writ of certiorari was filed June 22, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence introduced on behalf of petitioners in support of a statutory exception was so conclusive as to have required, in the absence of rebuttal testimony by the Government, the direction of a verdict of acquittal.

2. Whether petitioners were deprived of a fair trial (a) by the failure of the trial court to correct an alleged misstatement in the summation of the prosecuting attorney, or (b) by the court's misstatement in its charge to the jury of certain items of evidence.

STATUTE INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in part:

> (a) REQUIREMENT.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this section shall not apply to—
>
> * * * * *
>
> (6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale * * *.
>
> * * * * *

(g) PENALTIES.—Any person who violates any provisions of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of New York on April 29, 1943, on an indictment charging them in two counts with the possession and transportation of distilled spirits in containers on which there were not affixed stamps denoting the quantity of the spirits contained therein and evidencing payment of all internal revenue taxes, in violation of Section 2803 (a) of the Internal Revenue Code (R. 4, 6–7). Each of the petitioners was sentenced to imprisonment for one year and six months on each count, the sentences to run concurrently (R. 4). On appeal to the Circuit Court of Appeals for the Second Circuit the convictions were affirmed (R. 82–86).

The evidence for the Government was substantially as follows:

On the afternoon of Saturday, December 26, 1942, in Brooklyn, N. Y., three agents of the Alcohol Tax Unit of the Treasury Department, after certain observations, proceeded by automobile to follow another automobile (R. 11, 21). The automobile being followed turned a corner

(R. 11, 22). The agents, reaching the same corner, stopped to observe (R. 11, 22). The car under observation had drawn up at the curb, and the agents saw petitioners get out (R. 11, 22). Petitioner Marino then opened the rear door, looked up, and seeing the agents' car, glanced at petitioner Vigorito and slammed the door shut (R. 11, 22). The agents then started their car and as they proceeded, petitioner Marino again opened the rear door (R. 11, 22). At this point the agents approached petitioners, and while doing so, they saw petitioner Marino take a carton from the back seat of the car (R. 12, 22). The agents investigated and discovered that in the carton was an unstamped tin can containing about 3½ gallons of alcohol (R. 14–15, 22), which, upon subsequent analysis by a government chemist, was found to be ethyl alcohol, 89.37 percent by volume, fit for beverage purposes (R. 29).[1] The chemist characterized the alcohol as "a run-of-the-mill of bootleg alcohol" (R. 29).

The agents testified that, upon questioning petitioner Vigorito at the time, he said that he owned several trucks and planned to use the alcohol as an antifreeze (R. 12, 25); that he had purchased it for 80 cents a gallon from a garage "around the corner" about an hour before (R. 12, 22). Petitioner Marino, who was questioned separately,

[1] A motion to suppress evidence was denied prior to trial (R. 3–4).

stated to one agent that there was "nothing" in the package and to another that he did not know where the alcohol came from (R. 12, 22). The agents and petitioners then proceeded to the garage in question (R. 12–13, 23). However, it was closed and securely locked (R. 12–13, 23). Thereupon, petitioner Vigorito remarked that it had been open an hour before when they had acquired the alcohol from a "young fellow" whom he would "produce at the right time" and who had taken it "out of a barrel in a small room off of the office" (R. 13). On Monday, December 28, 1942, the agents secured admission to the garage and found it filled with new trucks, but without a trace of alcohol in the indicated small room (R. 13–14). The Government chemist testified that radiator alcohol is denatured ethyl alcohol and has an odor unlike the alcohol found in petitioners' possession (R. 29); that that alcohol would be "expensive stuff" to use as a radiator antifreeze (R. 31).

In defense petitioners offered the testimony of one Feioto, petitioner Vigorito's brother-in-law (R. 35), and also testified in their own behalf.

Feioto testified that on December 26, 1942, he was employed as a handyman at the garage in question; that while the garage was closed, the cellar, which he had been cleaning, was open (R. 33). Petitioners were driving past the garage and stopped to talk to him (R. 33). In the course of the conversation, he told petitioners that he had

found "some radiator alcohol * * * in the cellar" and asked them whether they could use it (R. 33–34). When petitioners replied in the affirmative, he went down into the cellar, brought up the alcohol in a tin box, and deposited it in the back of petitioners' car (R. 34). Petitioners then departed (R. 34). He knew the alcohol was radiator alcohol because he had "smelled radiator alcohol once before" (R. 35–36).

Petitioners testified substantially to the same effect as Feioto (R. 38–45), adding that they gave Feioto $2.50 for the alcohol (R. 41) and that they were intercepted by the agents on their way home (R. 40–41, 44). Each of the petitioners testified that their sole purpose was to use the alcohol as an antifreeze and that they had no intention of selling it or of using it to manufacture any product for sale (R. 40–42). On cross-examination petitioner Marino admitted that at a "hearing" the week before, he had stated that he had purchased the alcohol from a man on the corner whom he would recognize if he saw him (R. 43–44).

Petitioner Vigorito admitted convictions for grand larceny, dealing in stolen automobiles, and coercion (R. 38–39). Petitioner Marino admitted a conviction for automobile theft (R. 43).

The Government put on no witnesses in rebuttal (R. 45). At the close of all the evidence petitioners moved for direction of a verdict on

the ground that there had been no contradiction of their defense (R. 45).[2] The trial judge denied the motion and petitioners excepted (R. 45). In submitting the case to the jury, the court charged that "the Government made out a prima facie case in their allegations by alleging the possession and the failure to affix a stamp, but the question now is whether they had it in their possession for sale. The burden is still on the Government to prove that beyond a reasonable doubt" (R. 51).

ARGUMENT

1. Laying aside superficialities in their argument, petitioners' position is that the Government made out only a minimal case of possession and transportation of distilled spirits in an unstamped container, and that this was so completely overcome by uncontradicted and unimpeached testimony[3] that the spirits were not intended for

[2] Specifically, petitioners asserted in their motion for a directed verdict that "the evidence in the case fails to establish a crime under the statute, on the ground that it does not appear beyond a reasonable doubt that the case was not within that specific statutory exemption" (R. 45).

[3] In this connection petitioners rely primarily upon the testimony of Feioto. They seem to recognize that if they depend solely on their own testimony, it was proper for the trial judge to deny their motion for a directed verdict since a question of credibility was involved in view of their manifest interest and their criminal records (See p. 6, *supra*). Cf. *Wheeler* v. *United States*, 80 F. (2d) 678 (C. C. A. 5); and see *United States* v. *Sebo*, 101 F. (2d) 889 (C. C. A. 7); *Ward* v. *United States*, 96 F. (2d) 189 (C. C. A. 5).

sale, and hence were within an exception in the statute, as to have required the direction of a verdict.

The difficulty with petitioners' argument is, we submit, that it does not reflect the true state of the evidence. The Government in its proof established considerably more than the mere transporting and possession of distilled spirits in an unstamped container. In and of itself this evidence was sufficient to warrant a finding that petitioners did not possess and transport the spirits for the innocuous purpose of using them as an antifreeze, as was asserted. Inconsistent with an innocent use of the alcohol were the following factors: The unusual actions of the petitioners when they observed the agents' car while they were unloading the alcohol; petitioner Marino's statement to one agent that he did not know where the alcohol came from, or indeed, what was in the package, whereas petitioner Vigorito told another agent that he had purchased the alcohol an hour before from a garage "around the corner"; the peculiar circumstance that although the agents proceeded immediately to the garage in which the alcohol was said to have been obtained, the garage was locked and closed, despite the fact that it was still afternoon; petitioner Vigorito's assertion that the "young fellow" he would produce "at the right time" obtained the alcohol from a barrel in a small room

adjoining the garage office, as contrasted with the failure of the agents to find any trace of alcohol in that room when they, two days later (a Sunday intervening), gained admission to the garage; and the acquisition by petitioners as an antifreeze of a product ordinarily used not for that purpose but as a "bootleg" beverage, which normally would be too expensive to be used as a nonfreeze (*supra*, pp. 3–5).

But support for a conclusion that the alcohol was not possessed for a legitimate purpose, as petitioners claim, does not rest upon the Government's evidence alone; it is bolstered by inconsistencies between the trial testimony of petitioners and earlier statements which they made to the officers and by a forthrightness in their trial testimony which was lacking when the officers questioned them. Thus, petitioner Vigorito, in testifying, stated that the alcohol had been taken from the cellar (R. 39–40), whereas, almost contemporaneously with the event, he told one of the officers it had come from a room adjoining the office of the garage. Further, he was able at the trial to state with certainty that he had obtained the alcohol from his brother-in-law Feioto, who had found it in the cellar (R. 39), although at the time he was apprehended he could identify Feioto only as a "young fellow" whom he would "produce at the right time." Petitioner Marino at the trial concurred in petitioner Vigorito's ver-

sion of what had occurred (R. 42), although, when apprehended, he did not know where the alcohol came from or even what was in the package.

The testimony of Feioto, upon which petitioners so strongly rely, is subject not only to the same infirmity that credulity is strained by the story of all three as to the circumstances under which alcohol of a beverage character was obtained by petitioners as an antifreeze, but is otherwise vulnerable. Feioto testified that he knew definitely that the alcohol was radiator alcohol, predicating his identification on his knowledge of the smell of radiator alcohol (R. 35), but a government chemist, who was an expert, stated that the alcohol did not have the odor of radiator alcohol. And of course the relationship of Feioto, although not dispositive, was a factor which the trial judge was entitled to consider in appraising his testimony.[4] Clearly, the testimony of Feioto, from the standpoint of probative value, was not sufficient to require the trial court to grant an instruction which would amount to a command to the jury to accept it as the truth.

In short, when the testimony is viewed as a whole, we do not believe that there can be any doubt that the state of the evidence was such as to make it unnecessary for the Government to adduce further proof when the defendants had

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[4] Cf. *Arnall Mills* v. *Smallwood*, 68 F. (2d) 57, 59 (C. C. A. 5).

rested, or that the case was one for disposition by the jury rather than by the trial judge.[5]

2. (a) Petitioners assert (Pet. 5, 14–16) that they were prejudiced by remarks alleged to have been made by the prosecutor during his summation to the effect that there was an issue of veracity as between the government agents and the defense witnesses; petitioners claim that there was no basis in the evidence for such an argument. However, neither the specific comments of which petitioners complain nor the context are included in the record, and neither is the summation of petitioners' counsel (see R. 46–48).[6] There is,

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[5] *Ezzard* v. *United States*, 7 F. (2d) 808 (C. C. A. 8), the authority principally relied upon by petitioners and asserted to be in conflict with the decision below (Pet. 6–7, 14), is readily distinguishable. There it was held, in a prosecution for illegal possession of narcotics under a statute providing that possession shall be presumptive evidence of a violation, that a motion for a directed verdict of acquittal should have been granted where the defendant had offered credible and uncontradicted testimony of several disinterested witnesses to support his contention of innocent possession. One judge dissented on the ground that a question of fact was presented by the evidence. The *Ezzard* case was distinguished on its facts by the same court the following year. *Weeke* v. *United States*, 14 F. (2d) 398, 400 (C. C. A. 8), certiorari denied, 273 U. S. 662.

[6] The record contains only the objection of petitioners' counsel to the remarks in question and the ensuing colloquy between the court and counsel. Petitioners' statement (Pet. 15) that the trial court refused to permit the reporter to take the prosecutor's summation does not completely describe the incident. The request was made during the prosecutor's summation and after petitioners' counsel had completed his summation. The court therefore declined to grant the re-

therefore, no basis for appellate review of the incident. *Vause* v. *United States,* 53 F. (2d) 346, 354 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Murphy* v. *United States,* 39 F. (2d) 412, 414 (C. C. A. 8); *Hoffman* v. *United States,* 20 F. (2d) 328, 329 (C. C. A. 8); *Silkworth* v. *United States,* 10 F. (2d) 711, 721 (C. C. A. 2), certiorari denied, 271 U. S. 664. Moreover, clearly the defense testimony offered to show that petitioners' possession and transportation were within the statutory exception was not consistent with their conduct and explanation as reflected in the testimony of the Government witnesses. Accordingly, in that sense, an issue was raised as to the truth of the defense testimony. That issue was, therefore, a proper subject of the prosecuting attorney's summation.[7]

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quest on the ground that it should have been made at the opening of the summations in order to afford the prosecutor an opportunity to ask that the defense summation be recorded (R. 46).

[7] By the same token there is no merit in petitioners' objection (Pet. 15–16) that the trial judge in his instructions improperly framed an issue of veracity as between the Government and defense witnesses. The only exception in this respect which petitioners took was to the judge's reference to the conflict in the testimony as to the place where the spirits had allegedly been kept (R. 58), the judge having pointed out in his charge that the agent had testified that Vigorito had stated to him that he had obtained the spirits from a barrel in a small room off the office of the garage, whereas Feioto had testified that he got the spirits from the cellar (R. 52–53). The judge's comments in this regard were entirely consistent with the evidence (see R. 13, 33–34).

(b) Petitioners' contention (Pet. 16) that the trial court's misstatement in its instructions of certain items of evidence requires a reversal of their convictions, is unavailing.[8] Although petitioners did take certain exceptions to the instructions (see R. 58–59), they did not object to the statements of which they now complain and must be presumed to have acquiesced therein. Therefore, their contention, raised for the first time on appeal, presents nothing for review, for, as was

[8] Petitioners point first to a statement of the trial court that "they got the stuff to use it as a non-freeze in trucks; and, of course, it was testified here that that was kind of a high price to pay for a non-freeze" (R. 53). The court was referring to the testimony of the government chemist that the alcohol was "expensive stuff for a radiator" (R. 31). The court below properly held that at most the characterization of the alcohol in terms of price was a slip of the tongue which most probably did not mislead the jury (R. 84). Petitioners' other objection is to the trial court's rhetorical question whether petitioners knew that the persons who observed them in the act of removing the carton containing the alcohol from the car, were government agents, and consequently whether their conduct in not completing the act until after the agents had passed on, was consistent with innocence (R. 54). There appears to have been no evidence that petitioners actually knew that the men who were observing them were government agents. In the court below, Judges Clark and Chase thought, it seems to us correctly, that under the circumstances the comment was not improper; Judge Frank felt that it added to the actual evidence and hence was prejudicial. All agreed, however, that petitioners' failure to call the trial court's attention specifically to the matter at the time and to seek a correction left no occasion for a reversal (R. 85).

held in *Allen* v. *United States,* 4 F. (2d) 688, 694 (C. C. A. 7), certiorari denied subnom *Hunter* v. U. S., 267 U. S. 597:

> Errors in the instructions should be pointed out specifically before the jury retires, and the court should be given an opportunity of correcting its mistake or oversight. This rule is dictated by public policy, and prevents new trials and unnecessary expense.

See also *Johnson* v. *United States,* 318 U. S. 189, 199–200; *Allis* v. *United States,* 155 U. S. 117, 122–123; *United States* v. *Manton,* 107 F. (2d) 834, 846–847 (C. C. A. 2), certiorari denied, 309 U. S. 664.

CONCLUSION

The case was correctly decided below. There is involved no conflict of decisions or question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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TOM C. CLARK,
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IN THE

Supreme Court of the United States

October Term, 1944

No. 183

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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The argument in opposition to this petition rests upon a misconception of the record.

In its recital of the occurrences just preceding the arrest of the defendants, the Government's brief (p. 4) reads:

> "Petitioner Marino then opened the rear door, looked up, and seeing the agents' car, glanced at petitioner Vigorito and slammed the door shut (R. 11, 22)."

There is in this statement the assumption that the petitioners saw the agents' car, and the implication that they recognized it as such, and hastily shut the door of their own car. The testimony supports neither the assumption nor the suggested inference.

Agent Jedrey testified (R. 11) that petitioner Marino opened the rear door of his car, and looked in the direction of the corner where the agents' car stood. The witness was careful to correct his inadvertent statement that the petitioner "looked toward us", changing it immediately to "looked toward the corner where we were parked".

The other agent who testified, said nothing about either petitioner opening the rear door. He said merely that "* * * two men got out of the car. They looked back at us and closed the door again * * *" (R. 22).

This false assumption goes to the heart of the Government's argument that petitioners' actions were inconsistent with innocence.

Moreover, this incident has been the subject of misstatement and unfounded inference throughout the history of the case. The Trial Judge put to the jury the questions whether the petitioners knew the agents, and whether they closed the door after seeing them, and then reopened it and removed the alcohol after the agents had passed by, and, finally, whether those were the actions of innocent men, or of men who had something to conceal (R. 54).

In the Circuit Court of Appeals, there was disagreement on the question whether the Trial Court's comment prejudicially added to the evidence (R. 85). The judges who thought it did not, came to that conclusion "in view of the evidence to the effect that defendants discontinued removal of the carton from the car until they thought the agents had ceased to observe them" (R. 85). There is no such evidence. The fault in these convictions is that there is no evidence to support them.

The discussion of this question, in a footnote to the Government's brief (p. 13, n. 8), concedes that there was no evidence "that the petitioners actually knew that the men who were observing them were government agents"; but like the opinion below, it fails to recognize the fact that there was no evidence that the petitioners knew that

anyone was observing them, nor even that the petitioners saw the agents or their car.

Another misleading statement results from an obvious typographical error in the record, not heretofore noticed. Petitioner Marino is quoted as replying "Nothing" when he was asked by a Government agent what was in the package (Govt. Br. 5).

Inspection of the record makes it clear that the agent testified "and Marino said nothing", i. e., made no reply (R. 22). A few sentences later, the same witness said "so Marino continued to be silent" (R. 22). The other agent testified that he heard the question asked, and that he did not hear any answer from Marino (R. 12).

The other matters to which the Government points as indicative of guilty possession are scarcely enough even to arouse suspicion.

The Circuit Court of Appeals for the Second Circuit rejects the doctrine that a conviction based upon circumstantial evidence should be reversed unless the circumstances are inconsistent with any reasonable theory of innocence (*U. S.* v. *Mule*, 141 F. (2d) 487, 488; *U. S.* v. *Valenti*, 134 F. (2d) 362, 364). Consistent with that rejection, it affirmed the petitioners' convictions upon the theory that circumstantial evidence which permits but does not compel an inference of guilt may be made the basis for a finding of guilt despite direct, uncontradicted, unimpeached and reasonable testimony that the fact does not exist.

We believe that that theory is untenable, particularly in support of a conviction in a criminal case. It is contrary to the holding of another Circuit Court of Appeals, and inconsistent with decisions of this Court.

It is for that reason that the petitioners submit that their convictions should be reviewed, and the conflict resolved by this Court.

Conclusion

The petition and record herein present a proper case for the exercise of this Court's discretionary power to review, and we respectfully submit that the writ of certiorari ought to be granted.

J. Bertram Wegman,
Counsel for Petitioners.

Emanuel H. Reichart,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1944

No. 183

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

J. BERTRAM WEGMAN,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

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No. 183

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v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

COME NOW CONRAD MARINO and GABRIEL VIGORITO and respectfully petition this Honorable Court for a reconsideration of their petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Eastern District of New York, whereby your petitioners were adjudged guilty of an unlawful possession of distilled spirits in containers bearing no internal revenue stamps, and were sentenced to imprisonment for a term of eighteen months.

The petition was submitted under number 183 of the October Term, 1944, and was denied by order filed October 9, 1944.

I

In this case your petitioners were each sentenced to serve eighteen months in the penitentiary on proof only that they possessed less than four gallons of potable alcohol, despite positive and unimpeached proof that such possession was *not* for the purpose of sale or manufacture into an article for sale.

The applicable statute specifically exempts such possession from its sanction.

II

Thus there is here presented a direct and unmistakable conflict between Circuit Courts of Appeals relating to a fundamental principle of proof in criminal cases.

III

The Court below held that the presumption arising from mere possession may be weighed against and may overcome the positive evidence to disprove it. This holding is not only in conflict with the decision of the Circuit Court of Appeals in the Eighth Circuit in *Ezzard* v. *United States,* 7 F. (2d) 808, but is in conflict with fundamental principles. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286; *Tot* v. *U. S.,* 319 U. S. 463, 469.

IV

If a jury is to say in all cases whether evidence contrary to a presumption has weight and credibility enough to overcome it, then it is idle to speak of presumptions "disappearing" from the case. The submission of the question to a jury necessarily implies that there is something to be weighed against the proof; and where, as here, there is no evidence, that thing can only be the initial presumption.

The Trial Court recognized that the evidence produced by petitioners was sufficient, *prima facie.* But its sub-

mission to the jury, under instructions that the Government must overcome their defense beyond a reasonable doubt, was an evasion of its duty to direct a verdict, in the absence of *any* evidence to overcome it.

V

It would seem that at the very least there should have been some evidence, however slight, that these petitioners were engaged in the bootleg traffic, or somehow connected with it. There was none such. It was never even suggested that these petitioners had ever been so much as suspected of any traffic in un-taxpaid liquor.

VI

This Court may have overlooked the fact that the very necessity of showing that their possession was innocent compelled these petitioners to expose their previous bad record—altogether foreign to the liquor traffic—and thus inevitably to prejudice the jury against them. It is perfectly obvious that in a situation like that in the case at bar it is too much to expect a jury to give such facts only the weight which they deserve. It is hopeless when, as here, the prejudice is reinforced by inflammatory argument by the prosecutor, and by the Trial Judge's statements that there was proof of facts not in the testimony at all.

VII

Petitioners should not have to undergo imprisonment for a year and a half for a crime they clearly did not commit; but a more compelling consideration is that the doctrine of this case needs review in this Court if the basic conceptions of presumption of innocence, and of proof beyond a reasonable doubt, are not to be reduced to a mere empty form of words, devoid of substance.

This conviction is wrong, morally and legally. It is the more insidious because accomplished by what appears on

the surface to be proper procedure. It is that sort of factitious observance of the rules which leads to the most outrageous invasions of liberties which are supposed to be protected by the requirements of due process of law.

WHEREFORE, your petitioners pray that their petition for a writ of certiorari may be reconsidered. Counsel certifies that this petition is presented in good faith and the sincere belief that it has merit, and not for the purpose of delay.

And your petitioners will ever pray, etc.

CONRAD MARINO and
GABRIEL VIGORITO,
Petitioners,

by J. BERTRAM WEGMAN,
Counsel for Petitioners.